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10 *Of Counsel*

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12

13 IN THE UNITED STATES BANKRUPTCY COURT
14 FOR THE EASTERN DISTRICT OF WASHINGTON

15

16 In re:
17 ROGER A. STADTMUELLER,
18 Debtor.

Case No. 17-03545-FPC11
Chapter 11

19

**UNITED STATES' NOTICE AND
MOTION TO CONVERT OR
APPOINT A TRUSTEE**

20

21 PLEASE TAKE NOTICE that the United States of America ("United
22 States") hereby moves the Court for an Order converting the above-captioned
23 Chapter 11 case to a Chapter 7 case or alternatively appointing a trustee.
24 U.S.' Motion to Convert or 1
Appoint Trustee
(Case No. 17-03545-FPC11)

1 Any party objecting to the motion must file a written objection stating the
2 grounds for the objection. Any objection, to be effective, must be filed with the
3 Court no later than 21 days from the service of this Notice, by sending the same to
4 Clerk of the Court at 402 E. Yakima Ave., Suite 200, Yakima, WA 98901 or 904
5 West Riverside Avenue, Room 304, Spokane, WA 99201, and served upon the
6 undersigned, and on the trustee. The date of service of this Notice is specified
7 below and in the Proof of Service which accompanies this Notice.

8
9 All persons should note that their failure to file an objection may result in
10 the Court entering an order as stated above.

11
12 **MOTION**

13 The United States, by and through its undersigned counsel, pursuant to 11
14 U.S.C. §§ 1112(b) and 1104(a), hereby moves the Court to convert this case to
15 Chapter 7 or to appoint a trustee. The relief in this Motion is sought alternatively to
16 the relief sought in the United States' Motion to Dismiss, filed on February 1,
17 2018. ECF No. 43. By reference, the United States incorporates its Motion to
18 Dismiss, including the background referenced therein.

19
20 Section 1112(b) authorizes the bankruptcy court to dismiss or convert a
21 Chapter 11 case to a Chapter 7, whichever is in the best interests of creditors and
22 the estate, "for cause, unless the court determines that the appointment under
23 section 1104(a) of a trustee or an examiner is in the best interest of creditors and
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1 the estate.” 11 U.S.C. § 1112(b). “Although the language of section 1112(b)
2 provides a list of possible circumstances for ‘cause,’ this is not an exhaustive list,
3 and in fact the court is not limited to the enumerated grounds in making its
4 determination of some ‘cause.’ … Thus, in determining ‘cause’ for dismissal the
5 court may consider other factors as they arise and use its powers to reach
6 appropriate results in individual cases.” *In re Gonic Realty Tr.*, 909 F.2d 624, 626
7 (1st Cir. 1990) (internal quotations and citations omitted). “The bankruptcy court
8 has broad discretion in determining what constitutes ‘cause’ under section
9 1112(b).” *Sullivan v. Harnisch (In re Sullivan)*, 522 B.R. 604, 614 (9th Cir. B.A.P.
10 2014). The movant bears the burden of proving by a preponderance of the evidence
11 that cause exists for dismissal or conversion. *Matter of Woodbrook Assocs.*, 19
12 F.3d 312, 317 (7th Cir. 1994)

15 Additionally, the court may order the appointment of a Chapter 11 trustee
16 and replace the debtor in possession. 11 U.S.C. § 1104(a). The appointment is
17 mandatory if a court finds cause, including “fraud, dishonesty, incompetence, or
18 gross mismanagement” by the debtor’s current management, or if the court
19 determines that “the appointment is in the interest of creditors.” 11 U.S.C. §
20 1104(a). Some courts hold that the movant must establish cause of appointment of
21 a trustee by the preponderance of the evidence. *In re Corona Care Convalescent*
22 Corp., 527 B.R. 379, 384 (Bankr. C.D. Cal. 2015) (“The parties seeking
23 U.S.’ Motion to Convert or
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1 appointment of a Chapter 11 trustee under 11 U.S.C. § 1112(b)(1) and/or 1104(a)
2 have the burden of proving appropriate grounds exist for such appointment by the
3 preponderance of the evidence") (citations omitted); *Tradex Corp. v. Morse*, 339
4 B.R. 823, 832 (D.Mass.2006); *In re Costa Bonita Beach Resort*, 479 B.R. 14, 44
5 (Bankr.D.P.R.2012); *see also Grogan v. Garner*, 498 U.S. 279, 286–291 (1991)
6 (Preponderance of the evidence standard applies unless express congressional
7 direction to apply higher standard). However, some courts have required to present
8 clear and convincing evidence of the trustee's necessity. *In re Bayou Group, LLC*,
9 564 F.3d 541, 546 (2d Cir.2009); *In re G-I Holdings, Inc.*, 385 F.3d 313, 317–18
10 (3d Cir. 2004) (explaining that heavy “presumption” against appointment of a
11 trustee refers to a heavy burden of persuasion by clear and convincing evidence
12 that the party moving for appointment must bear).

15 Here, cause exists to dismiss or convert this case or to appoint a trustee.
16 Debtor has failed to file income tax returns for multiple years, without any
17 justifiable cause. While Debtor’s counsel indicated that the Debtor is in the process
18 of finalizing his income tax returns, he has not done so to date. Additionally, while
19 the Debtor amended his Scheduled D and E/F pursuant to the filing of the United
20 States’ Motion to Dismiss, and included the IRS’ claims on Schedules D and E
21 (ECF No. 48), it still remains unclear how and when payments to the IRS will be
22 made. Further, while there may be a change in Debtor’s financial circumstances
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(Case No. 17-03545-FPC11)

1 now that he is released from prison, Debtor's accounting of his income on
2 Schedule I of his bankruptcy schedules seems inaccurate at best, and he has failed
3 to indicate how he intends on increasing his income. Finally, as detailed in the
4 United States' Motion to Dismiss, this is Debtor's fourth bankruptcy petition in a
5 period of three years and two weeks.

7 Summarily, as detailed in the United States' Motion to Dismiss, Debtor's
8 bankruptcy was filed in bad faith, and there is substantial or continuing loss to or
9 diminution of the estate and the absence of a reasonable likelihood of
10 rehabilitation. As such, this case should be dismissed or converted to Chapter 7
11 under 11 U.S.C. § 1112(b), or alternatively a trustee should be appointed under 11
12 U.S.C. § 1104(a)¹.

14 | Respectfully submitted on February 8, 2018.

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

/s/ Rika Valdman
RIKA VALDMAN
Trial Attorney, Tax Division
U.S. Department of Justice

²⁰ ¹ It should also be noted that whether this case is dismissed, converted to a Chapter
21 7, or a trustee is appointed in Debtor's stead, the bankruptcy automatic stay does
22 not apply to the restitution judgment against the Debtor. See *In re Partida*, 862
F.3d 909 (9th Cir. 2017) *In re Robinson*, 764 F.3d 554 (6th Cir. 2014); *United
States v. Colasuonno*, 697 F.3d 164 (2d Cir. 2012).

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6

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2018, I filed the foregoing document with the Court through the Court's CM/ECF system, which will send notification of such filing to the following:

Timothy R. Fischer
Email: trf@winstoncashatt.com
Attorney for Debtor

James D Perkins
Email: james.perkins@usdoj.gov
Attorneys for the United States' Trustee

Lesley D. Lueke
Email: ecfwaeb@aldridgepte.com
Attorney for Creditor JPMorgan Chase Bank, N.A.

I further certify that on this 8th day of February, 2018, I caused the mailing of the foregoing to the following:

Aldridge Pite, LLP
4375 Jutland Drive, Suite 200
P.O. Box 17933
San Diego, CA 92177-0933

/s/ Rika Valdman
RIKA VALDMAN
Trial Attorney
Civil Trial Section, Western Region

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